Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

DOCKET NO.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1997

FRIEDRICH LU
PETITIONER

v.

FEDERAL HOME LOAN MORTGAGE CORP., ET AL.
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

Friedrich Lu, pro se Petitioner
c/o Middlesex County Law Library
40 Thorndike Street, 4th Fl.
Cambridge, MA 02141-1755

33PP

QUESTIONS PRESENTED FOR REVIEW:

(1) Can a creditor, being a party in interest, move Bankruptcy Court to enforce automatic stay?

(2) Were petitioner's right to due Process violated?

Where after petitioner as creditor was denied standing to move for enforcement of automatic stay in an bankruptcy proceeding and after he appealed on issue of law, Bankruptcy Court tucked a "fact" in a ruling on motions to dismiss, and without knowledge of parties, sent the ruling to Bankruptcy Appellate Panel which then dismissed appeal on ground of the supplied "fact," though agreeing with petitioner on issue of law presented for review.

Court of Appeals decided the case on April 9 & 29, 1998. The parties there were: Friedrich Lu, Plaintiff/Appellant v. Federal Home Loan Mortgage Corp., Paul Ravida, Mario Myrthil, Jeffrey M. Winik and CamillaDuffy,Defendants/Appellees

The case was not reported; no citation was available.

The 28 USC §1254(1) confers on this Court jurisdiction to review on a writ of certiorari the order in question.

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The statutes and regulations involved:

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STATEMENT OF FACTS

Debtor Paul Ravida filed a voluntary bankruptcy petition under chapter 7 on March 4, 1997. One week before, he transferred one of his real estates (where petitioner Friedrich Lu resided) through Federal Home Loan Mortgage Corp. (FHLMC) to Mario Myrthil, all without compensation. Later the latter two would claim that as successor to a creditor, FHLMC foreclosed the property and sold it to Myrthil it for $ 110,000. However, they could not produce any evidence but Bankruptcy Court for a year has ignored Lu's motion to compel production.

As the only creditor who filed a claim, Lu paid to initiate an adversary proceeding to object to discharge. 11 USC § 727(a)(4)(A) (debtor made a false oath in petition). App.A13.

To evict Lu, in late June, 1997, Myrthil went to Boston Housing Court where respondents Winik and Duffy were a judge and an assistant clerk. Having stricken Lu's notice of automatic stay based on 11 USC 362(a)(3) (act to obtain possession of estate), Housing Court entered adverse judgment by default. In the midst of that proceeding, Lu turned to Bankruptcy Court for injunction, which Myrthil opposed, arguing that only debtor, but not creditor, has standing to request enforcement of automatic stay. On July 29, 1997, Bankruptcy Court denied Lu's motion ("This court lacked jurisdiction to enjoin another court").

For half a year, Boston Housing Court sat on Lu's notice of appeal from the judgment there, refusing to send the case up to state appellate court for review. Then, unbeknownst to Lu and despite state laws forbidding execution while an appeal is pending (*e.g.*, Mass. Gen.L. c. 235, § 16; c. 231, § 115; Mass. R.Civ.P. 62(d)), Housing Court issued an execution for Myrthil to obtain possession and $ 6,000 against Lu. On January 20, 1998, deputy sheriffs broke open Lu's locked apartment door, flashed the execution for the first and only time, and arrested Lu when he (Lu) explained the execution was void. All of Lu's belongings were left behind; Lu could not change clothes, or bring a penny or ID with him. He has been homeless since. Hence he subsequently sought to proceed in forma pauperis.

On January 30, 1998, Bankruptcy Court denied Lu's emergency motion to enforce stay, this time for lack of standing ("The moving party is not a debtor in this Court thus automatic stay is not in effect"). App. A14. Alarmed by such a nonissue, Lu rushed to present case laws dating back to early 1800's which pointedly supported a creditor's standing.[1] Still Bankruptcy Court declined to reconsider ("Frivolous").

Lu appealed to Bankruptcy Appellate Panel (BAP).
(1) The appellate record, as designated under Fed.R.Bankr.P. 8006, contained two items: A14, 15 (and nothing else).
(2) The issues presented for review were:

(a) Can a creditor, being a party in interest, move Bankruptcy Court to enforce automatic stay?

(b) Should Plaintiff's motion for lis pendens have been allowed?

(3) Docket entries of Bankruptcy Court, certified by clerk of that court and sent to BAP, stopped on February 11, 1998.

Subsequent to Lu's filing of Appellant's Brief, Bankruptcy Court on February 17, 1998, entered a dismissal order and accompanying Memorandum, App. A1-4, which Lu did not learn of until much later as he, being homeless, had to pick up rulings at clerk's offices. See A14.

BAP dismissed the appeal. A5-7. While agreeing with Lu that "any party of interest may request enforcement of automatic stay," A7, BAP concluded that Bankruptcy Court's "jurisdiction is lacking;" and that "no basis exists for the bankruptcy court to establish jurisdiction over the current owner" -- relying on the "fact" found by Bankruptcy Court in the Memorandum that "the real estate in question was never property of the estate as the foreclosure proceedings occurred prior to the filing of debtor's petition." App. A6-7; A2.

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[1] See *Walker* v. *Wanton* (C.C.D.C. 1807) 29 Fed.Cas. No.17090; *In re Goldberg* (D.C.N.Y. 1902) 117 F. 692, 9 Am.Bankr.Rep. 156; *Depauli* v. *Espitallier* (1906) 3 Cal.App. 239, 84 P. 999; *In re Lopez-Soto* (CA1 1985) 764 F.2d 23; *Bradt v. Woodlawn Auto Workers, F.C.U.* (CA2 1985) 757 F.2d 512; *In re J.F.D. Enterprises, Inc.* (Bankr.D.Mass.1995) 183 B.R. 342, 348. See also 11 USC § 362(d) ("party in interest" may request relief from automatic stay, which is mirror image of Lu's request for enforcement of automatic stay); 11 USC § 1109(b) ("party in interest" includes creditor)

Lu was dismayed. Without giving notice to parties, Bankruptcy Court sent the Memorandum, which was the only substantive ruling in a year other than those on Lu's motions to enforce automatic stay, directly to BAP whose panel composition was not available to the public until it (BAP) announced the decision. BAP clerk's office said the Memorandum did not go through it. Lu moved for full disclosure. BAP stated that there was "no contact with the bankruptcy court other than reviewing public records in the case below." A8. Bankruptcy Court so far has not ruled on the motion.

The third issue presented to the Court of Appeals, plus the original two, was whether Lu's right to due process was violated. Lu cited *Trest* v. *Cain*, *infra*. Court of Appeals affirmed under 28 USC § 1915(e). Without explanation, it brushed aside Lu's argument regarding BAP's notice of the bankruptcy court's orders as "completely meritless." A11. Contending § 1915(e) dismissal should be without prejudice, Lu asked to pay filing fee, so that the appeal could be decided on the merits. A17. The motion was denied. A12.

ARGUMENT

Ordinarily plaintiff has the burden of proof. A defendant, however, is obligated to raise and preserve a defense if it is not to lose the right to assert the defense thereafter. *Trest* v. *Cain* (1997) _ U.S. _, 118 S.Ct. 478, 480. Since January 20, 1998, Respondents have not showed up in any court below. Thus Lu might have been declared a winner by default. This is particularly true in that the burden of proof shifted to respondents in lifting automatic stay. More importantly, Bankruptcy Court denial of Lu's emergency motion was based on law, whereas BAP affirmed based on a "fact" which was not on the appealate record.

A. Respondents had burden of proof both before and after violating automatic stay.

Bound by automatic stay, FHLMC and Myrthil should have commenced an adversary proceeding in the Bankruptcy Court, to determine the validity of their ownership in

property, and to request relief from the stay. Fed.R.Bankr.P. 7001(2), (7), and (9); 11 USC § 362(d). In that situation, they (FHLMC, Myrthil), not Lu, have "the burden of proof on the issue of the debtor's equity in property." *Id.*, § 362(g). See also 3 *Collier on Bankruptcy*, ¶ 362.10 (15th rev. ed. 1998).

"Undoing the stay retroactively" (i.e., creating *fait accompli* by defying automatic stay, *then* asking bankruptcy court for retroactive lifting of the stay) "should require a measurably greater showing" than seeking relief from stay beforehand. *In re Soares* (CA1 1997) 107 F.3d 969, 977.[2]

Respondent went further: They completely ignored automatic stay, before and after its violation on January 20, 1998. They have not bothered to seek the lifting of stay. Nonetheless, "the burden of proof on the issue of the debtor's equity in property" is still on them, not Lu.

That issue is straight forward. Either version of property transactions can be easily verified. But for Bankruptcy Court's inaction for one year, the proceeding would be over long ago.

B. BAP based its decision on "fact" nonexistent on record. *Patterson* v. *Colorado* (1907) 205 U.S. 454, 462, stated:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with reference to a court.

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[2] *In re Soares*,107 F.3d, at 976, commented on retro-active lifting of automatic stay *after* having violated the stay:

> "Treating an action taken in contravention of the automatic stay as *void* places the burden of validating the action after the fact squarely on the shoulders of the offending creditor. In contrast, treating an action taken in contravention of the automatic stay as *voidable* places the burden of challenging the action on the offended debtor." (emphases added)

In re Soares spoke from the circumstances at hand where a creditor was the aggressor whereas the debtor, a victim of violation of automatic stay. There is a role reversal here. Still, *In re Soares* is correct in placing the burden of validating the violation on the offender, not on the offended.

See also Canon 3A(3), Code of Conduct for United States Judges (*ex parte* communication proscribed).

The record on appeal at BAP as define by Fed.R.Bankr.P. 8006 consists of items designated by parties, in contrast to Fed.R.App.P. 10(a) (*all* papers filed at district court comprise record on appeal at court of appeals). See *10 Collier on Bankruptcy*, ¶¶ 8006.02, 8006.03 and n.1 (compare these two rules); 20 *Moore's Federal Practice* (3rd ed. 1998) § 306.11[2][a] (same).

(1) Appeal at BAP

Bankruptcy Court's Memorandum (as well as dismissal order), App. A1-4, was not part of appellate record, was "neither raised nor argued" in Lu's brief, *Trest* v. *Cain*, *ibid.*, because the Memorandum was decided *after* the appeal. BAP could not consider it.

Lu was not accorded a notice of Bankruptcy court's secret communication with BAP, let alone a chance to rebut. See *Mullane* v. *Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314, 315. Lu's right to due process was violated.

(2) Appeal at Court of Appeals

Nor can Court of Appeals, which affirmed essentially for the same reasons, consider the Memorandum. The appellate record at Court of Appeals is the same as that at BAP, absent redesignation of record, which did not occur. See Fed.R.App.P. 6(b)(2)(ii); *In re Abijoe Realty Corp.* (CA1 1991) 943 F.2d 121, 123, n. 1; *In re Columbia Gas System, Inc.* (D.Del.1992) 146 B.R. 106, 110, n. 2.

C. There are additional reasons that Bankruptcy Court's dismissal order and Memorandum should not be considered.

(1) They were not appealable when made,

(a) because they left one count intact. See App. A3, n. 2.

(b) because they did not explicitly grant lifting of automatic stay, which would be immediately appealable. Indeed, procedural protection of 11 USC § 362(d) requires "a request of a party in interest" *and* "after notice and a hearing," neither of which occurred here.

(2)(a) Obligated to accept the complaint as true , Bankruptcy Court could not find facts in ruling motions to dismiss --

particularly a finding (on foreclosure) "[a]cording to debtor's Statement of Financial Affairs," App. A2, the very item Lu's complaint had charged debtor with making a false oath in.

(b) Fed.R.Evidence 201 forbade Bankruptcy Court to take judicial notice over a point of contention.[3]

WHY PETITION SHOULD BE GRANTED

True, S.Ct. Rule 10 stated, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." However, the courts below found facts in an unlikely place. Fraud or not, it does not affect a court's jurisdiction to adjudge.

Recently, Lu applied for writ of certiorari (Friedrich Lu v. David Christiani, et al., S.Ct. No. 97-[illegible]) in that federal courts in this circuit proclaimed lack of federal subject matter jurisdiction over various civil causes of action (*e.g.*, RICO and 42 USC § 1983). Supposedly both state and federal court have jurisdiction over them. But once federal court renders authoritative interpretation on federal law, state court is effectively foreclosed. Over Bankruptcy, federal court has exclusive jurisdiction. *Kalb* v. *Feuerstein* (1940) 308 U.S. 433. See 12 USC § 1452(f) (original jurisdiction in cases involving FHLMC). Still federal courts here managed to wriggle out of jurisdiction. Hence, exercise of this Court's supervisory power is warranted.

RELIEF SOUGHT: GVR (certiorari granted, judgment vacated and remand)

Petitioner: Friedrich Lu, pro se. Signed: Date: May 8, 1998
Address: c/o Middlesex County Law Library, 40 Thorndike Street, 4th Fl., Cambridge, MA 02141-1755

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[3] For this reason, it is not necessary to discuss how Bankruptcy Court could abstain but meanwhile dismissed "with prejudice," see *e.g.*, App. A6, ¶ 3; or if it had authority to dismiss nonbankruptcy federal claims. App. A1. See *In re Walton* (Bankr.N.D.Ohio.1993) 158 B.R. 939.

The First Amended Complaint is reprinted for reference. App. A17-19. In September, 1997, Lu moved District Court for withdrawal of reference, which is mandatory under 28 USC § 157(d). That motion (along with others) has not been ruled since.

United States Bankruptcy Court
District of Massachusetts

In Re:	*	Chapter 7
	*	Case No. 97-12041
PAUL RAVIDA, Debtor	*	
FRIEDRICH LU, Plaintiff	*	
	*	Adversary Proceeding
v.	*	No. 97-1347-CJK
	*	
PAUL RAVDA, ET AL.,	*	
Defendants	*	

MEMORANDUM OF DECISION

The Plaintiff, Friedrich Lu, filed this complaint on June 5, 1997 against the Debtor, Paul Ravida, under 11 U.S.C. § 523(a)(6) and 11 U.S.C. § 727. On August 1, 1997, the Plaintiff amended his complaint to add thirty-six additional defendants, including an associate justice of the housing court, and to add several state law claims and nonbankruptcy federal claims. Before the Court are five separate motions to dismiss; (1) motion to dismiss by Max Moise, Barry C. Abelson & Associates, Barry C. Abelson, Scott W. Kramer, Jill M. Bradley, and interested party Mario Myrthil; (2) motion to dismiss by Harmon Law Offices, P.C., Andrew S. Harmon, Mark P. Harmon, and John T. Precobb; (3) motion to dismiss by Federal Home Loan Mortgage Corporation; (4) motion to dismiss by Alexis W. Blood, Adelson, Golden & Loria, Martin A. Loria, James A. Kelley, Gary P. Sanginano, Stephen M. Adelson, Lisa B. Weisman, and Lauren H. Zises; and (5) motion to dismiss by Camilla Duffy and Jeffrey Winik. The remaining defendants have failed to answer or otherwise respond to the amended complaint.

This Court may abstain from hearing matters involving state law claims and causes of action pursuant to 28 U.S.C. § 1334(c). Section 1334(c) provides;

> (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c). This Court will abstain from hearing everything except the § 523 and § 727 causes of action for the following reasons.

First, this adversary proceeding appears to relate to property that is not part of the bankruptcy estate. According to the Debtor's Statement of Financial Affairs, First Commercial Mortgage Company foreclosed on the property located at 123-125 Sydney Street, Dorchester, Massachusetts in May of 1996; the Debtor did not file his Voluntary Chapter 7 Petition until March 4, 1997. Under 11 U.S.C. § 541(a)(1), this property was not property of the estate when the Debtor filed his petition.[1]

Second, currently pending before state and federal courts in this district are civil causes of action against all thirty-seven defendants named in the First Amended Complaint. These actions apparently relate to the same issue presented here, namely, whether the foreclosure proceedings were

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[1] Under 11 U.S.C. § 541(a)(1) property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Here, the Debtor did not hold any interest in the subject property on March 4, 1997.

proper. A resolution of this issue necessarily turns on state law issues and does not require any bankruptcy expertise. For this reason, this matter is better left to the state courts.

Finally, the majority of the parties in this proceeding bear no relationship to the Debtor or to this bankruptcy estate. Whether the Court has subject matter jurisdiction is entirely unclear; but, even if I do have jurisdiction, since most of the parties are nondebtor parties and are unrelated to the bankruptcy proceeding, this Court should abstain.

For all of these reasons, the Court will abstain from hearing everything but the § 523 and § 727 actions. Because the First Amended Complaint is incomprehensible[2] and does not clearly state a cause of action under § 523 or § 727, the Court will order the Plaintiff to amend his complaint. A separate order will enter dismissing Counts Two through Sixteen.

Date: February 17, 1998

/s/ Carol J. Kenner
Carol J. Kenner
United States Bankruptcy Judge

cc: Friedrich Lu, Plaintiff
Stephen Gray, Chapter 7 Trustee
All Defendants
Joseph G. Albiani, Esq., for the Debtor

Paul Ravida, Debtor
127 Sydney Street #1
Dorchester, MA 02125

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[2] Count One of the First Amended Complaint states;

> Lu objects to Ravida's bankruptcy discharge, on the grounds that (a) Lu's lawsuits against debtor is about wilful (sic) and malicious injuries committed by Ravida. 11 USC § 523(a)(6); (b) Ravida schemes to defraud creditors, including Lu, by making a false oath in his bankruptcy petition. 11 USC § 727.

United States Bankruptcy Court
District of Massachusetts

In Re:	*	Chapter 7
	*	Case No. 97-12041
PAUL RAVIDA, Debtor	*	
FRIEDRICH LU, Plaintiff	*	
	*	Adversary Proceeding
v.	*	No. 97-1347-CJK
	*	
PAUL RAVDA, ET AL.,	*	
Defendants	*	

ORDER DISMISSING COUNTS TWO THROUGH SIXTEEN

For the reasons set forth in the Court's Memorandum of Decision, Counts Two through Sixteen of the First Amended Complaint are hereby DISMISSED.

Date: February 17, 1998

/s/ Carol J. Kenner
Carol J. Kenner
United States Bankruptcy Judge

cc: Friedrich Lu, Plaintiff
Stephen Gray, Chapter 7 Trustee
All Defendants
Joseph G. Albiani, Esq., for the Debtor

Paul Ravida, Debtor
127 Sydney Street #1
Dorchester, MA 02125

ENTERED ON DOCKET
2/17/98

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

In re:	*	BAP NO. MB 98-008
	*	
PAUL RAVIDA, Debtor	*	
**********		
FRIEDRICH LU,	*	Case No. 97-12041-CJK
Plaintiff/Appellant	*	Adv. No. 97-1347
	*	
v.	*	
	*	
PAUL RAVIDA, et. al,	*	
Defendants/Appellees	*	
**********		

Before GOODMAN, LAMOUTTE and HAINES, Bankruptcy Judges.

ORDER DENYING STAY AND DISMISSING APPEAL

PER CURIAM.

Before the Bankruptcy Appellate Panel is a Motion for Stay Pending Appeal, filed by creditor, Friedrich Lu, seeking to enjoin execution of a Massachusetts Housing Court Order which caused forcible removal of Lu from his apartment on January 20, 1998.[1] This request arises from an adversary proceeding initiated by Lu against the debtor in the United States Bankruptcy Court for the Eastern District of Massachusetts.[2] Lu requested a stay in the bankruptcy court on February 11, 1998 which was denied that same day.

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[1] Lu filed a Motion to Stay Housing Court Execution Pending Appeal, on February 13, 1998, and Statement in Support of Expedited Motion to Stay Boston Housing Court's Execution Pending Appeal, on February 17, 1998.

[2] It seems that this is one of at least two adversaries initiated by Lu against debtor. In this adversary proceeding, Lu appears to be objecting to debtor's discharge.

DISCUSSION

A motion for stay pending appeal of a judgment or order is discretionary and governed by Rule 62(c) & (g) of the Federal Rules of Civil Procedure and Rule 8005 of the Federal Rules of Bankruptcy Procedure. A stay pending appeal is injunctive in nature and may be granted where: 1) the movant establishes the likelihood of success on the merits; 2) the movant will suffer irreparable injury if the stay is denied; 3) that the harm suffered by the movant outweighs any harm opposing parties may suffer if the stay is granted; and, 4) granting of the stay would serve the public interest. In re Power Recovery Systems, Inc., 950 F.2d 798, 850 n. 31 (1st Cir. 1991).

Lu indicates that until January 20, 1998, he resided at 123 Sidney Street, Dorchester, Massachusetts as a tenant when forcibly removed by the Deputy Sheriff pursuant to a Massachusetts Housing Court order.[3] As indicated in the bankruptcy court documents, this property was subject of a successful foreclosure action against the owner in Massachusetts State Court during May, 1996. However, it was not until March 4, 1997, approximately 10 months after foreclosure, that a bankruptcy petition was filed.

Upon removal, Lu requested from the bankruptcy court an order enjoining the Massachusetts Housing Court from executing the order pursuant to the automatic stay provision of the Bankruptcy Code. The bankruptcy court denied the request indicating that Lu was "not a debtor in this Court thus the automatic stay provision [was] not in effect." Bankruptcy Court's Order, filed on 1/30/98. Most recently, the bankruptcy court issued an order dismissing several named defendants, with prejudice, and numerous counts in Lu's Complaint. Bankruptcy Court's Memorandum of Decision, filed on February 17, 1998. Relying on the fact that the real estate in question was never property of the estate as the foreclosure proceedings occurred prior to the filing of debtor's petition and given the fact that the removal action against Lu arose from these state court proceedings, the bankruptcy court abstained pursuant to 28 U.S.C. § 1334(c).

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[3] Lu implies that this order also contained a $6,000. judgment against Lu.

We find that Lu's request must fail as jurisdiction is lacking, thereby, precluding any likelihood of success on the merits on appeal. Bankruptcy court has jurisdiction to consider all matters related to the property of the estate. 28 U.S.C. §§ 1334(e) and 157(a),(b). Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). While the debtor may have once owned the property from which Lu was removed, foreclosure occurred prior to the filing of debtor's bankruptcy petition. As such, the property in question never was part of the estate and no basis exists for the bankruptcy court to establish jurisdiction over the current owner.

For the same reasons, the automatic stay provision does not prohibit Lu's removal from the real property. While Lu may be correct in concluding that any party of interest in a bankruptcy case may request enforcement of the automatic stay provision, the stay only extends to those matters affecting the debtor's interest in property of the estate. 11 U.S.C. § 362(a). As Lu is not the debtor and the property is not part of debtor's estate, the automatic stay provision does not prohibit the current owner from taking any action against Lu in relation to the property. The forum from which Lu may seek relief from an eviction order is exclusively limited to state court.

Based on the foregoing, Lu's Motion for Stay Pending Appeal is hereby DENIED and the appeal is DISMISSED.

SO ORDERED.

On this 27th day, February 1998.

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

In re:	*	BAP NO. MB 98-008
	*	
PAUL RAVIDA, Debtor	*	
**********		
FRIEDRICH LU,	*	Case No. 97-12041-CJK
Plaintiff/Appellant	*	Adv. No. 97-1347
	*	
v.	*	
	*	
PAUL RAVIDA, et. al,	*	
Defendants/Appellees	*	
**********		

Before GOODMAN, LAMOUTTE and HAINES, Bankruptcy Judges.

ORDER

Appellant's Motion requesting stay or suspension of Boston Housing Court's order pending appeal is hereby DENIED for the reasons stated in our order denying stay pending appeal and dismissal of the appeal issued on February 27, 1998. In addition, having no contact with the bankruptcy court other than reviewing public records in the case below, appellant's request that we "fully disclose all secret communications with the Bankruptcy Court" is also DENIED.

SO ORDERED.

On this 3rd day of March, 1998.

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

In re:	*	BAP NO. MB 98-008
	*	
PAUL RAVIDA, Debtor	*	
**********		
FRIEDRICH LU,	*	Case No. 97-12041-CJK
Plaintiff/Appellant	*	Adv. No. 97-1347
	*	
v.	*	
	*	
PAUL RAVIDA, et. al,	*	
Defendants/Appellees	*	
**********		

Before GOODMAN, LAMOUTTE and HAINES, Bankruptcy Judges.

ORDER DENYING APPLICATION TO PROCEED IN FORMA PAUPERIS

PER CURIAM.

Before the Bankruptcy Appellate Panel is an Application to Proceed without Prepayment of Fees and Affidavit filed by appellant, Friedrich Lu, seeking review by the United States Court of Appeals for the First Circuit of this Panel's order dismissing his appeal. Rule 24 of the Federal Rules of Appellate Procedure require that appellant present his petition to the court below in the first instance.[1]

A petition to proceed in forma pauperis is granted or denied at the discretion of the court, however, this discretion is limited to the determination of poverty, good faith of the applicant and meritoriousness of the appeal.[2] *Kinney v.*

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[1] Rule 24 provides, in pertinent part:

(a) A party to an action in district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that the party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party

Plymouth Rock Squab Co., 236 U.S. 43, 46 (1915). Upon determination of the applicant's financial eligibility, the court has the duty to examine the merits of the appeal to ensure that judicial and public resources are not expended needlessly on an appeal which has no basis in law or fact. *E.g.*, *Neitzke v. Williams*, 490 U.S. 319, 325-29 (1989); *Adkins*, 335 U.S. at 337. *See also Denton v. Hernandez*, 504 U.S. 25, 31-33 (1992)(dismissal of an in forma pauperis complaint should only occur when the allegations lack any factual basis and not where the allegations are simply unlikely); *Coppedge v. U.S.*, 369 U.S. 438, 445 (1962) (probable success on the merits need not be shown, however, where any nonfrivolous or colorable issue on appeal exists, the court is required to grant a motion for leave to file in forma pauperis).

Lu's application shows that he is unemployed, without assets, receives financial assistance from his family and carries considerable debt. We are satisfied that Lu meets the requisite showing of poverty. *Adkins v. E. I. DuPont de Nemours & Co.*, 335 U.S. 331, 339-40 (1948). However, relying on the findings made in the order dismissing the appeal, issued on February 27, 1998, we are convinced that Lu's request to proceed in forma pauperis should be denied as the appeal has no basis in law or fact.

Accordingly, Lu's application to proceed in forma pauperis is hereby DENIED.

SO ORDERED.

On this 25th day of March, 1998.

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may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

[2] Title 28 U.S.C. § 1915(e)(2), as amended in 1996, provides in part:

> Notwithstanding any filing, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--
>
> (A) the allegation of poverty is untrue; or (B) the action or appeal-
>
> (i) is frivolous or malicious;
>
> (ii) fails to state a claim on which relief may be granted; or
>
> (iii) seeks monetary relief against a defendant who is immune from relief.

A11

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 98-9006

IN RE: PAUL RAVIDA,
Debtor.

FRIEDRICH LU,
Plaintiff, Appellant,

v.

PAUL RAVIDA, ET AL.,
Defendants, Appellees.

Before

Torruella, Chief Judge,
Selya and Stahl, Circuit Judges.

ORDER OF COURT

Entered April 9, 1998

Upon careful review of the record and appellant's filings in this court, we conclude that this appeal must be dismissed as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i). We reach this conclusion essentially for the reasons stated in the Bankruptcy Appellate Panel's orders dated February 27 and March 25, 1998. Appellant's additional argument regarding the Bankruptcy Appellate Panel's notice of the bankruptcy court's orders is completely meritless.

This appeal is dismissed. Appellant's pending motions are denied as moot.

By the Court:
/s/ Phoebe Morse
Clerk

UNITED STATES COURT OF APPEALS
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IN RE: PAUL RAVIDA,
Debtor.

FRIEDRICH LU,
Plaintiff, Appellant,

v.

PAUL RAVIDA, ET AL.,
Defendants, Appellees.

Before

Torruella, Chief Judge,
Selya and Stahl, Circuit Judges.

ORDER OF COURT

Entered April 29, 1998

Appellant is advised that his appeal was dismissed as frivolous because it lacked merit, and his present "motion to clarify order" is denied accordingly.

By the Court:

PHOEBE D. MORSE, Clerk

By: /s/ JANICE M. O'NEIL
Chief Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re Paul Ravida, Debtor		
Friedrich Lu, Plaintiff	)	Case No.97-12041CJK chapter 7
v.	)	Adversary Proceeding
Paul Ravida, Defendant	)	No. 97-1347

COMPLAINT

In 1995 and 1996, intervenor/creditor Friedrich Lu (Lu) sued Paul Ravida (Ravida) in the state and federal court, both cases are still pending. Ravida then meticulously incurred obligation, squirreled away the illegal gain, concealed his asset and finally initiated a chapter 7 bankruptcy petition to defraud creditors, all in combination of the remaining defendants-in-counterclaim and others unnamed here.

Lu objects to Ravida's bankruptcy discharge, on the grounds that (a) Lu's lawsuits against debtor is about wilful (sic) and malicious injuries committed by Ravida. 11 USC § 523(a)(6); (b) Ravida schemes to defraud creditors, including Lu, by making a false oath in his bankruptcy petition. 11 USC § 727.

Lu also requests court cost, fee, and other relief this court deems fit.

Intervenor: Friedrich Lu
Signed: /s/ Friedrich Lu
Date: June 5, 1997
Address: 123 Sydney Street, #3, Dorchester, MA 02125

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re Paul Ravida, Debtor		
Friedrich Lu, Plaintiff	)	Case No.97-12041CJK chapter 7
v.	)	Adversary Proceeding
Federal Home Loan	)	No. 97-1347
Mortgage Corp., et al.,	)	
Defendant	)	

PLAINTIFF'S EMERGENCY MOTION

On Jan. 20, 1998, Defendants showed plaintiff a copy of "execution for possession" for the first time and locked him out since, despite the premises he resides (address below) is part of bankruptcy estate, in violation of 11 USC § 362(a)(3). See also *Kalb* v. *Feuerstein* (1940) 308 U.S. 433.

On the aforesaid day, plaintiff was driven out without a penny or ID card allowed to carry with him. Without any court paper or computer, plaintiff can only draw this motion in handwriting.

Plaintiff prays that this court enforce automatic stay and restore status quo to the day before Jan 20.

An emergency hearing is requested.

Intervenor: Friedrich Lu
Signed: /s/ Friedrich Lu
Date: January 30, 1998
Address: 123 Sydney Street, #3, Dorchester, MA 02125

Plaintiff is currently staying in the homeless shelter. Please hold any mailing to him, so that plaintiff can claim at Clerk's Office.

Jan. 30, 1998 Denied. The moving party is not a Debtor in this Court thus the automatic stay is not in effect.
/s/ Carol J. Kenner
ENTERED ON DOCKET 2/2/98

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re Paul Ravida, Debtor		
Friedrich Lu, Plaintiff	)	Case No.97-12041CJK chapter 7
v.	)	Adversary Proceeding
Federal Home Loan	)	No. 97-1347
Mortgage Corp., et al.,	)	
Defendant	)	

PLAINTIFF'S EX PARTE MOTION FOR LEAVE TO FILE LIS PENDENS

Pursuant to Massachusetts Gen.L. chap. 184, § 15, plaintiff Friedrich Lu moves for allowance of his motion for lis pendens on 123-125 Sydney Street, Dorchester, MA 02125. The above captioned action constitutes a claim that affects the title to said real property or the use and occupation thereof or the buildings thereon, as demonstrated in the Complaint filed on August 1, 1997 (Docket #14).

A proposed Memorandum of Lis Pendens is attached hereto.

Plaintiff: Friedrich Lu, pro se
Signed: /s/ Friedrich Lu
Date: February 3, 1998
Address: 123 Sydney Street, #3, Dorchester, MA 02125

2/30/98. Denied. Frivolous.
/s/ Carol J. Kenner

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-9006

Friedrich Lu, Plaintiff/Appellant

v.

Federal Home Loan Mortgage Corp., Paul Ravida, Mario Myrthil, Jeffrey M. Winik, and Camilla Duffy, Defendants/ Appellees

PLAINTIFF'S MOTION TO CLARIFY ORDER

Plaintiff just learned of this court's dismissal of his appeal, entered on April 9, 1998. As the appeal was dismissed as frivolous under 28 USC § 1915(e)(2(B)(i), " presumably the dismissal was NOT on the merits. See *Denton* v. *Hernandez* (!992) 504 U.S. 25, 34; *Williams* v. *Roberts* (CA5 1997) 116 F.3d , 1127, 1129 (citing a precedent of that circuit and another from the Eighth Circuit).

WHEREFORE, plaintiff requests that he be allowed to pay the filing fee to have the appeal decided on the merits. (Currently plaintiff has no idea where to get the fee, but he is willing to put the money where the mouth is. The case, and the appeal, warrants a decision on the merits.)

Plaintiff/Appellant: Friedrich Lu, pro se
Signed: /s/ Friedrich Lu
Date: April 14, 1998
Address: 123 Sydney Street, #3, Dorchester, MA 02125

A copy of this document was served on the same day on appellees by hand.

P.S. Plaintiff requests a ruling on this motion before April 23, the last day he might have to file a petition for rehearing if it turned out that the April 9 decision was on the merits.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS, EASTERN DIVISION

In re Paul Ravida, Debtor Case No.97-12041CJK chapter 7
Adversary Proceeding No. 97-1347

Friedrich Lu, individually and as a repreentative of others similarly situated, Plaintiffs v. Federal Home Loan Mortgage Corp.; Lisa B. Weisman; Stephen M Adelson; gary P. Sanginario; James A Kelley; Martin A. Loria; Adelson, Golden & Loria; Tipton Graham; Pasquale Marcantuono; Kathleen Guerrette-Mitchell; Sandra M. Connelly; H+Jeffrey M. Winik; Camilla Duffy; John A. Berretta; LouShann M. Turner; George M. Jones; Darrell L. McDougal; Daniel J. McKenzie; LaurenH. Zises; First Commercial Mortgage Co.; John T. Precobb; Mark P. Harmon; Andrew S. Harmon; Law Offices of Mark Harmon; DLC Management Corp.; Jacqueline White; Fleet Mortgage Corp.; Alexis W. Blood; Joseph G. Albiani; Jill M. Bradley; Scott W. Kramer; Barry C. Abelson; Barry C. Abelson & Associates; Mario Myrthil; Max Moise; Donna McDonough; Paul Ravida; Defendants

First Amended Complaint

1) Plaintiff Friedrich Lu (Lu), Federal Home Loan Mortgage Corp. (hereafter "Federal;" based in Virginia). and Law Offices of Mark Harmon (with offices in Massachusetts, New Hampshire and Rhode island) are engaged in instate commerce. Lu's operational funds and loans are from several states and nations.

2) In 1995 and 1996, Lu sued Paul Ravida (Ravida) in the state and federal court, both cases are still pending. Ravida then meticulously incurred obligation, squirreled away the illegal gain, concealed his asset and finally initiated a chapter 7 bankruptcy petition to defraud creditors, all in combination of the remaining defendants.

3) To that end, repeatedly defendants broke into Lu's apartment, stole (or at other times cut off) utilities, vandalized the building where Lu resides -- creating noise, debris and waste, and manufactured criminal complaints against Lu, all were decided in Lu's favor. Defendants further

conspired with state courts to deprive Lu's day in court. E.g., after Ravida's bankruptcy petition, they conspired with Jeffrey M. Winik and Camilla Duffy of Boston Housing Court, all without right and in blatant violation of federal laws (automatic stay) and United States Constitution (Amendment !, VII, XIV).

4) The scheme is ongoing and open ended.

5) All defendants combine to harass and deter Lu from his right to justice in court by massive, concerted, and purposeful group activities.

6) This conspiracy has injured Lu's trade and/or property interest. Lu also suffers loss of money.

Paragraphs 1 to 6 are repeated before every and each count below. the first count applies to Ravida and the remaining counts, to all defendants - as they are co-conspirators -- except Jeffrey M. Winik and Camilla Duffy are charged with Count Eight only.

7) Count One Lu objects to Ravida's bankruptcy discharge, on the grounds that (a) Lu's lawsuits against debtor is about wilful and malicious injuries committed by Ravida. 11 USC § 523(a)(6); (b) Ravida schemes to defraud creditors, including Lu, by making a false oath in his bankruptcy petition. 11 USC § 727.

8) Count two: Civil Rights Act (42 USC § 1983)

9) Count Three: Sherman Antitrust Act (15 USC § 1). All defendants contract, combine in the form of trust or otherwise, or conspire in restraint of trade or commerce among several states. Each lawsuit is a "market."

10) Count Four: Massachusetts Antitrust Act (G.L. c. 93)

11) Count Five: G.L. c. 93A, § 11 (unfair trade practice). Plaintiff engages in the conduct of trade or commerce, and suffers loss of money or property, real or personal, as a result of the use or employment by all defendants who engage in trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful.

12) Count Six: Racketeer Influenced Corrupt Organization Act (RICO; 18 USC § 1961 et seq.) By mail and phone calls among several states, all defendants conspire to violate or violate RICO through a pattern of racketeering activities.

Enterprise is Federal, Adelson, Golden & Loria, Barry C. Adelson, Mario Myrthil & Ravida. All others are RICO "persons."

13) Count Seven: Common Law tort of Fraud

14) Count Eight: Willful violation of automatic stay provided by 11 USC § 362(h).

15) Count Nine: Break and Entry; Home Invasion

16) Count Ten: Nuisance 17) Count Eleven: Vandalism

18) Count Twelve: Larceny

19) Count Thirteen: Intentional Infliction of Emotional Distress. By extreme and outrageous conduct which was beyond all possible bounds of decency and utterly intolerable in a civilized community; defendants intentionally or recklessly cause severe emotional distress.

20) Count Fourteen: Civil Conspiracy. All defendants combine and conspire to harm plaintiff by illegal means to achieve illegal purpose. Their combination possesses a peculiar power of coercion, due to mere force of numbers acting in unison or other exceptional circumstances.

21) Count Fifteen: Abuse of Process

22) Count Sixteen: Malicious Prosecution

Request for Relief

23) WHEREFORE, Lu demands: (a) judgment against defendants in an amount to be determined at trial--threefold when laws so dictate, plus interest, costs of suit and other relief as this Honorable Court deems just; (b)(i) injunctive relief to enforce automatic stay and (ii) an order to be placed in the dockets of Housing Court cases, voiding all rulings since March 4, 1997 (the day Ravida filed chap. 7 petition); (c)injunctive relief to keep defendants at least 10 feet off the building where Lu resides; (d) certification of the class under Fed.R.Civ.P. 23.

Jury Demand

24) Lu requests jury trial on all issues.

Plaintiff: Friedrich Lu, pro se Signed: /s/ Friedrich Lu
Date: July 31, 1997
Address: 123 Sydney Street, #3, Dorchester, MA 02125

The statutes and regulations involved are as followed. All emphases are added.

11 USC § 523 provides in pertinent part:

(a) A discharge under 727, 1141, 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

* * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 USC § 727 provides in pertinent part:

(a) The court shall grant the debtor a discharge, unless ---

(4) the debtor knowingly and fraudulently, in or in connection with the case ---

(A) make a false oath or account;

The 11 USC § 362 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition [for bankruptcy relief] operates as a stay, applicable to all entities, of ---

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under the title, or to recover a claim against the debtor that arose before the commencement of the case under the title;

* * *

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

* * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay ---

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if ---

(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization.
* * *

(g) In any hearing under subsection (d) and (e) of this section concerning relief from the stay of any act under subsection (a) of this section ---

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of an stay provided by this section shall recover actual damage, including costs and attorney's fee, and in appropriate circumstances, may recover punitive damage.

Massachusetts General Law Chapter 235, § 16, provides in toto:

No execution shall issue upon a judgment until the exhaustion of all possible appellate review thereof, and the receipt by the clerk of the trial court of appropriate rescript or order.

Mass. Gen.L. c. 231, § 115, provides in pertinent part:

No execution shall issue during the pendency of an appeal. In the event that execution has issued before the filing of a notice of appeal, upon the filing of such notice the clerk shall notify the officer holding the execution and all further proceedings thereon shall be stayed.

Mass. Rule of Civil Procedure 62(d) provides in toto:

Except as otherwise provided in these rules, the taking of an appeal from judgment shall stay execution upon the judgment during the pendency of the appeal.

Federal Rule of Bankruptcy Procedure (Fed.R.Bankr.P.) 7001 provides in pertinent part:

[An adversary proceeding] is a proceeding

* * *

(2) to determine the validity, priority, or extent of a lien or *other interest* in property * * *

(4) to object to or revoke a discharge,

* * *

(7) to obtain an injunction or other equity relief,

* * *

(9) to obtain a declaratory judgment relating to any of the foregoing,

Fed.R.Bankr.P. 8006 provides in pertinent part:

Within 10 days after filing the notice of appeal as provided by Rule 8001(a) [which governs appeal as of right] * * * the appellant shall file with the clerk and serve on the appellee a *designation of the items to be included in the record on appeal* and statement of the issues to be presented. Within 10 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of an additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties; the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of the fact, and conclusions of law of the court.

11 USC § 1109(b) provides in toto:

A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, *a creditor*, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

Federal Rule of Appellate Procedure 10(a) provides *in toto*:

The record on appeal consists of *the original papers and exhibits filed in the district court*, the transcript of the

proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.

Fed. Rule of Appellate Procedure 6(b)(2)(ii) provides in toto:

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel.

* * *

(b)(2)(ii) The Record on Appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other part of the record necessary, the appellee shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.

Federal Rule of Evidence 201 provides in pertinent part:

(a) Scope of rule

This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accurate cannot reasonably be questioned.

* * *

(e) opportunity to be heard

A party I entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior

notification, the request may be made after judicial notice has been taken.

Canon 3A(3), Code of Conduct for United States Judges provides in pertinent part:

A judge should * * * except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, on procedures affecting the merits, of a pending or impending proceeding.

The 28 USC § 157 provides in pertinent part:

(d) * * * The district court *shall*, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

The 12 USC § 1452(f) provides *in toto*:

all civil actions to which the [Federal Home Loan Mortgage] Corporation is a party shall be deemed to arise under the laws of the United States, and the district court of the United States shall have original jurisdiction of all such actions, without regard to amount of value.